

**COMPLAINT 2005 - No. 1
In Re Higginbotham**

**REASONABLE CAUSE DETERMINATION
STIPULATION AND ORDER**

May, 2005

I. Nature of the Complaint

The complaint makes four allegations against Senate employee Linda Higginbotham (Respondent) related to her alleged improper use of public resources:

1. The first allegation is that the Respondent made prolonged and extensive use of her state computer for personal communications in violation of RCW 42.52.160.
2. The second allegation is that the Respondent used her state computer to conduct the business of the Delphi Homeowner's Association (Association) in violation of RCW 42.52.160.
3. The third allegation is that the Respondent used her state computer to generate, expand or retain a business relationship between an ex-family member and the Association in violation of RCW 42.52.070 and/or RCW 42.52.160.
4. The fourth and final allegation is that the Respondent used public resources to harass the Association president by calling his place of employment in violation of RCW 42.52.160.

The complaint was filed with the Legislative Ethics Board (Board) on January 18, 2005. On January 20, at a regularly scheduled meeting, the Board concluded the complaint was within its jurisdiction and ordered an investigation. Mr. Ken Wilson, of Wilson Investigative Services, was hired to conduct the investigation. On February 8, the Respondent filed with the Board an "Initial Response to Complaint Filed by Daniel Holm." The Respondent was interviewed by Mr. Wilson on February 10 and Mr. Wilson orally presented a preliminary investigative report to the Board at its next meeting on February 17. The Respondent was interviewed a second time on March 9 and Mr. Wilson submitted his written investigative report on March 17. The Board continued its discussion of the report and the complaint at its April 21 meeting. On April 26, Respondent filed a Supplemental Response to Complaint Filed by Daniel Holm (Supplemental Response), which is attached. The Board continued its discussions at a regularly scheduled meeting on May 19.

II. Facts

1. The Respondent is employed as Constituent Relations Manager for the Senate Republican Caucus and in that role assists Senators with constituent casework. She often works in excess of what is commonly thought of as a normal work day.
2. The Respondent is a member and former president of the Association. The position of president of the Association is an elective post and is performed without compensation.
3. In January, 2004 Respondent was replaced, against her wishes, as Association president by Mr. Mark Holm, son of the individuals who filed this complaint. Mr. Holm and Ms. Higginbotham often

took opposite sides on contentious issues.

4. On May 6, 2004 Respondent placed three long distance phone calls from her work phone using the state-supplied SCAN system. The calls were placed to Grays Harbor Community College (GHCC) and the date and times correspond to the dates and times of calls alleged in the complaint to have been made to GHCC, the employer of Association president Mark Holm.

5. Two employees of GHCC created nearly-contemporaneous records or accounts of the substance of these calls and provided those to Mr. Holm who was the subject of the calls. The accounts of the calls establish they were made by a female caller who was "working for the Senate" and who was "responding to a complaint about you." In addition, the caller was quoted as saying she "had gotten a bad feeling about him." These accounts also state that the caller would not leave a name and number but partially identified herself as "Linda Higgi . . ."

6. Respondent, on May 10, 2004 and in response to a request from Mr. Holm, provided him with a letter addressed "To Whom It May Concern" in which she denied making contact with GHCC to ask any questions about Mr. Holm.

7. During the early stages of the investigation into this complaint, and in response to a request by the investigator, Respondent searched her computer records for documents germane to the allegations. One of the documents she provided was a memo dated July 12, 2004. The memo was addressed to Senator Cheryl Pflug and it indicated the Respondent was working on a constituent issue for the Senator on behalf of an employee at GHCC. The Respondent offered the memo in support of her position that any phone calls to GHCC would have been for legitimate constituent work purposes and not related to Mr. Holm or any attempt to discredit him.

8. On March 9, 2005 Mr. Wilson interviewed the Respondent a second time to inquire about her denial to placing calls to GHCC about Mr. Holm and to discuss with her the information provided by GHCC employees about those phone calls. The Respondent again denied making any calls about Mr. Holm.

9. At the request of the investigator, Respondent agreed to search further for any documentation which would support her position that she was performing constituent work for Senator Pflug at GHCC. An employee of the Legislative Service Center, the technical support group for the legislature's phone and computer systems, assisted in this search. The search was unsuccessful.

10. Mr. Wilson began a search of Respondent's computer records and found a memorandum from Respondent to Senator Pflug dated July 13, 2004. This memo concerned an employee at Highline Community College (HCC) who was being assisted by the Respondent at the request of the Senator. Several documents were found which showed that Respondent had performed extensive work on behalf of this HCC employee.

11. The GHCC memo dated July 12, 2004 and addressed to Senator Pflug was based on the HCC memo of July 13 and was created by the Respondent in an effort to support her assertions that she did not place the phone calls about Mr. Holm. The memos were identical except the names of the college and the person being assisted were changed. Respondent now admits to altering the memorandum to give the impression she had called GHCC on a constituent matter.

12. Respondent has a computer at her residence but it is "stand-alone" in the sense she does not have Internet or E-mail access at that location.

13. A review of Respondent's legislative office computer records, for the purpose of addressing the

other allegations in the Complaint, narrowed the applicable time frame of alleged misuse from March, 2003 until December, 2004. Approximately 351 E-mails were sent or received by Respondent pertaining to the conduct of the business of the Association. In addition, approximately 32 word processing documents dealt with Association business, including issues related to Respondent's position as president. Many of the e-mails were sent or received after Mr. Holm replaced Ms. Higginbotham as Association president. Some were sent during times outside what some would consider the normal Senate working day or customary lunch hour.

14. Respondent's former son-in-law is an accountant whose firm had a business relationship, established through a competitive process, with the Association. Some of the E-mails referred to in Fact 13 involved Association business relative to accounting services and the apparent deteriorating relationship between the Association and the former son-in-law. No files or documents were found which promoted or supported the services of the former relative.

III. Discussion of Violations of Law

1. *Allegation No. 1* - prolonged and extensive use of state computer for personal communication.

RCW 42.52.160 - Use of persons, money, or property for private gain.

(1) No state officer or state employee may employ or use any person, money, or property under the officer's or employee's official control or direction, or in his or her official custody, for the private benefit or gain of the officer, employee, or another.

(2) This section does not prohibit the use of public resources to benefit others as part of a state officer's or state employee's official duties.

(3) The appropriate ethics boards may adopt rules providing exceptions to this section for occasional use of the state officer or state employee, of de minimis cost and value, if the activity does not result in interference with the proper performance of public duties.

.160, therefore, prohibits all personal use of public resources outside one's official duties, unless the Board exercises the discretion granted it by the legislature to craft narrow exceptions to the prohibition. The Board exercised that rule-making authority by adopting Board Rule No. 3. Rule 3, together with a lengthy discussion and sixteen (16) hypothetical examples, is found on pages 83-88 in the current legislative ethics manual. In addition, each time a legislative employee logs on to their office computer the following warning appears on the initial screen:

REMINDER: You are logging on to the Washington State Legislature's computer network. Use of resources, including the Washington State Legislature's computer network and state issued computers, must comply with the State Ethics Act, RCW 42.52 and Legislative Ethics Board Rule 3.

Rule 3 creates a multi-prong test which, *if all conditions are met*, permits some limited personal use of public resources (emphasis added). The rule may be summarized as follows:

If there is no actual cost to the state or the cost is de minimis, if there is a public benefit, and if the use does not interfere with the performance of official duties, then infrequent and incidental use of state resources for private benefit may be permissible.

(i) The cost to the state is de minimis if the actual expenditure of state funds is so

small as to be insignificant or negligible.

(ii) A public benefit under this rule may be direct or indirect, such as improving employee morale or activities that improve the work-related job skills of a legislator or employee. (Page 84, 2004-05 Legislative Ethics Manual)

In this case the facts show a pattern of frequent use of the computer unrelated to any of Respondent's official duties. The several hundred e-mails and documents, many of which were directed at various disputes with Mr. Holm, are devoid of any public benefit analysis. Finally, it cannot plausibly be argued that the multitude of e-mails and documents did not interfere with the performance of official duties. Respondent's initial position, that many of the documents were created, sent or received during hours beyond normal work hours and therefore her work was not impacted, is not well taken. If the demands of an employee's job require longer hours than normal it must be assumed that the employee is performing the work during those extra hours. Longer hours are not a defense to the use of public resources for frequent and occasionally lengthy correspondence on personal or business matters.

2. *Allegation No. 2* - use of state computer to conduct the business of the Association.

RCW 42.52.160(1), cited in the discussion of the first allegation, prohibits the use of public resources for the private benefit or gain of the Association or the Respondent. Conducting Association business with the use of public resources was a benefit to the Association and a benefit to the Respondent as she carried out some of her duties as Association president during 2003 on her office computer. Further, Respondent did not have a home computer with E-mail or internet access from which she could send and receive E-mails. This would have required a subscription fee to an Internet provider and she avoided those costs by using her state computer to send and receive E-mails and attached documents related to her position as president of the Association.

3. *Allegation No. 3* - use of state computer to generate, expand or retain a business relationship between an ex-family member and the Association.

RCW 42.52.070 prohibits a state officer or state employee from using his or her position to secure special privileges or exemptions for himself or herself, or his or her spouse, child, parent, or other persons. As discussed previously, RCW 42.52.160 prohibits use of public resources for the private benefit or gain of self or another.

No documents or facts were discovered to support the allegation that Respondent used her position or public resources with the intent to promote the financial gain of her former son-in-law. Rather, it appears that Ms. Higginbotham's concerns over Association accounting practices were related to Association business and e-mails to that effect may be considered as being related to the general business nature of her use of her state computer, discussed in Allegation No. 2.

4. *Allegation No. 4* - use of public resources to harass the Association president by calling his place of employment.

In Respondent's Supplemental Response to the complaint she admits to using her state phone to call GHCC about Mr. Holm and later altering the memorandum to Senator Pflug in an attempt to conceal the purpose of the phone calls. GHCC employees who took the calls from Respondent made records of the substance of those calls and those records indicate that Respondent made inquiries and/or suggestions about the character and reputation of Mr. Holm.

A personal use of state resources violates RCW 42.52.160 if, among other things, it interferes with

the performance of official duties. In Complaint 2001 - No. 1, a legislative employee used a legislative computer during the lunch hour to send a single E-mail, at little or no cost to the state, to family and friends in which she described her efforts on behalf of a constituent. We concluded that the employee's action constituted an ethical violation because the use of public resources to discuss legislative casework with family and friends necessarily interferes with the performance of the employee's official duties. The present case is analogous. Use of public resources by a legislative employee to place personal phone calls at little cost to the state, to an individual's employer which cast suspicion on the character and reputation of the individual, interferes with the performance of the legislative employee's official duties.

IV. Determination of Reasonable Cause

1. There is reasonable cause to believe that Respondent made prolonged and extensive use of her state computer for personal communications in violation of RCW 42.52.160.
2. There is reasonable cause to believe that Respondent used her state computer to conduct the business of the Delphi Homeowner's Association in violation of RCW 42.52.160.
3. There is no reasonable cause to believe that Respondent violated RCW 42.52.070 or RCW 42.52.160 to generate, expand or retain a business relationship between an ex-family member and the Association.
4. There is reasonable cause to believe that Respondent used public resources to harass the Association president by calling his place of employment in violation of RCW 42.52.160.

V. Conclusion and Order

Based on a review of the complaint, the Board's investigation and Respondent's Supplemental Response, the Board determines there is reasonable cause to believe Ms. Higginbotham violated RCW 42.52.160 as specified in allegations one, two and four.

There is no reasonable cause to believe Ms. Higginbotham violated RCW 42.52.070 or RCW 42.52.160 as specified in allegation three and that allegation is dismissed.

Board Rule 1(H) provides that a complaint may be settled by stipulation. Following its own complete and independent review, the Board accepts the Respondent's signed Supplemental Response as part of that stipulation.

Now, Therefore,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Respondent shall pay to the Washington State Legislative Ethics Board the sum of \$3,558.90 for the cost of the investigation of this case, pursuant to RCW 42.52.180 and Board Rule 5.

Pursuant to Board Rule 5(D) these assessments are the personal responsibility of the Respondent and must be paid within 45 days of the date of this Order, unless an extension is granted by the Board.

I, Linda Higginbotham, hereby certify that I have read this Reasonable Cause Determination, Stipulation and Order in its entirety; that I have stipulated to facts, conclusions of law and penalty in

my attached Supplemental Response; that I have had the option of reviewing this agreement with legal counsel, or have actually reviewed it with legal counsel and fully understand its legal significance and consequence. I agree to sign it as a resolution of this matter and have voluntarily signed.

Linda Higginbotham

Date

Having reviewed the Reasonable Cause Determination, Stipulation and Order, and Respondent's Supplemental Response, and of behalf of the Legislative Ethics Board, the stipulation is accepted.

John Betrozoff, Vice-Chair

Date